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No. 89 -

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

A.O. SMITH HARVESTORE PRODUCTS, INC., HERMITAGE HARVESTORE SYSTEMS, INC., and CHUCK DOWDY,

Petitioners,

v.

JAMES D. SAYLOR and KAAREN SAYLOR d/b/a UDDER NONSENSE DAIRY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

This case was tried twice, once in 1985, and again in 1987 on remand following reversal of the judgment in the first trial. Because of potential prejudice, the district judge instructed all parties, counsel, and witnesses at the second trial to refrain from informing the jury of the first trial. However, during a postverdict judicial inquiry of the jurors, the Petitioners established that a trial spectator, who was a relative of one of the witnesses that testified for Respondents, told a juror during a trial recess that the case had been previously tried two years earlier.

The questions presented for review are:

1. Whether, having established that an extraneous communication relating to the first trial was made to one of the jurors, the Petitioners were entitled to the rebuttable presumption of prejudice established in *Remmer v. United States*, 347 U.S. 227 (1954), and applied by the majority of the circuit courts, or were required to prove actual prejudice in accordance with the Sixth Circuit's minority view that *Smith v. Phillips*, 455 U.S. 209 (1982), a case involving juror bias, effectively overruled the *Remmer* presumption of prejudice in all juror misconduct cases.[1]

2. Whether, contrary to decisions by other circuits, the trial judge was permitted under Rule 606(b) of the Federal Rules of Evidence prohibiting intrusion into the jury's mental processes, to inquire of the jurors whether the extraneous communication had an "effect" on their verdict as the Sixth Circuit held.

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[1] If the Petition is granted, Petitioners will also argue that the Respondents did not rebut the presumption of prejudice by showing that the extraneous communication was harmless.

PARTIES TO THE PROCEEDING AND RULE 28.1 LISTING

Petitioners are A.O. Smith Harvestore Products, Inc., Hermitage Harvestore Systems, Inc., and Chuck Dowdy. Respondents are James D. Saylor and Kaaren Saylor d/b/a Udder Nonsense Dairy.

A.O. Smith Harvestore Products, Inc.'s subsidiaries are Sceptor Finance Company Inc. and 4-J Harvestore Systems, Inc. A.O. Smith Harvestore Products, Inc.'s corporate parent is A.O. Smith Corporation, a publicly held company traded on the American Stock Exchange. Subsidiaries and affiliates of A.O. Smith Corporation are:

A.O. Smith Electric Motors (Ireland) Ltd.
A.O. Smith Enterprises Ltd.
AgriStor Credit Corporation
AgriStor Credit Corporation of Canada Ltd.
Claymore Insurance Company, Ltd.
Fabricadores de Componentes de Motores S.A. De C.V.
Fabricantes de Componentes de Motrices S.A. De C.V.
Fabricantes de Motores de Mexico S.A. De C.V.
Motores Electricos de Juarez S.A. De C.V.
Productos de Aqua S.A. De C.V.
Productos Electricos Aplicados S.A. De C.V.
Smith Fiberglass Products Inc.
Metalsa S.A.
A.O. Smith Water Products Company B.V.
A.O. Smith L'Eau Chaude, Sarl
AOS Holding Company
A.O. Smith Holdings (Ireland) Ltd.
A.O. Smith International Trading Co.
Smith Investment Company

Hermitage Harvestore Systems, Inc. has no corporate parent, affiliates or subsidiaries.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 28.1 LISTING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY PROVISION INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
I. Summary Of Reasons	8
II. The Sixth Circuit's Decision Is In Direct Conflict With Decisions Of Other Circuits	11
III. The Issues Presented Are Important To Civil And Criminal Litigants And The Judiciary	18
CONCLUSION	20

APPENDIX

Opinion Of The Court Of Appeals	App. 1
Denial Of Petition For En Banc Rehearing	App. 17
Order Of the District Court	App. 19
Summary Chart Of Judicial Inquiry Testimony	App. 20

TABLE OF AUTHORITIES

CASES:	PAGE
Abell v. Potomac Insurance Co., 858 F.2d 1104 (5th Cir. 1988)	9, 19
Agristor Leasing v. Saylor, 803 F.2d 1401 (6th Cir. 1986)	3
Attridge v. Cencorp Division of Dover Technologies Int'l, Inc., 836 F.2d 113 (2d Cir. 1987)	13
Baca v. Sullivan, 821 F.2d 1480 (10th Cir. 1987)	19
DeGrave v. United States, 820 F.2d 870 (7th Cir. 1987)	7
Haley v. Blue Ridge Transfer Co., 802 F.2d 1532 (4th Cir. 1986)	6, 13
Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984)	9
Irvin v. Dowd, 366 U.S. 717 (1961)	10
Krause v. Rhodes, 570 F.2d 563 (6th Cir. 1977), *cert. denied*, 435 U.S. 924 (1978)	9
Mattox v. United States, 146 U.S. 140 (1892)	8, 17
McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548 (1984)	8, 10
Neron v. Tierney, 841 F.2d 1197 (1st Cir.), *cert. denied*, 109 S. Ct. 90 (1988)	12, 14, 19
Owen v. Duckworth, 727 F.2d 643 (7th Cir. 1984)	13
Remmer v. United States, 347 U.S. 227 (1954)	*passim*
Rinker v. County of Napa, 724 F.2d 1352 (9th Cir. 1983)	9, 10
Smith v. Phillips, 455 U.S. 207 (1982)	*passim*

Stephens v. South Atlantic Canners, Inc., 848 F.2d 484 (4th Cir.), *cert. denied*, 109 S. Ct. 564 (1988) 9

Tanner v. United States, 107 S. Ct. 2739 (1987) . 8. 15, 17

Transamerican Freight Lines v. Brada Mill. Freight Systems, Inc., 423 U.S. 28 (1975) .. 2

United States v. Bagnariol, 665 F.2d 877 (9th Cir. 1981), *cert. denied*, 456 U.S. 962 (1982) 7, 15

United States v. Bassler, 651 F.2d 600 (8th Cir. 1981) 15, 17

United States v. Brooks, 677 F.2d 907 (D.C. Cir. 1982) 7, 16

United States v. Butler, 822 F.2d 119 (D.C. Cir. 1987) 6

United States v. Caporale, 806 F.2d 1487 (11th Cir. 1986), *cert. denied*, 482 U.S. 917 (1987) 7

United States v. Cooper, 868 F.2d 1505 (6th Cir. 1989) 11

United States v. Crane, No. 86-3917, slip op. (6th Cir. Feb. 18, 1988) 11, 20

United States v. Delaney, 732 F.2d 639 (8th Cir. 1984) 7, 16

United States v. DeLutis, 722 F.2d 902 (1st Cir. 1983) 12

United States v. Greer, 620 F.2d 1383 (10th Cir. 1980) 7, 13, 17

United States v. Heller, 785 F.2d 1524 (11th Cir. 1986) 10, 18

United States v. Hornung, 848 F.2d 1040 (10th Cir. 1988) 7

United States v. Jelsma, 630 F.2d 778 (10th Cir. 1980) 17

United States v. Jonnet, 762 F.2d 16 (3d Cir. 1985) 7, 16

United States v. Kabir, Nos. 87-3850/3851, slip op. (6th Cir. Dec. 28, 1988), *cert. denied*, 109 S. Ct. 1325 (1989) 19, 20

United States v. Littlefield, 752 F.2d 1429 (9th Cir. 1985) 6, 11

United States v. Moten, 582 F.2d 653 (2d Cir. 1978) 5

United States v. Pennell, 737 F.2d 521 (6th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985) .. 6, 7, 11, ... 12, 16

United States v. Ramos, 861 F.2d 461 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 1353 (1989) .. 20

United States v. Robinson, 756 F.2d 56 (8th Cir. 1985) 7

United States v. Wiley, 846 F.2d 150 (2d Cir. 1988) 7

United States v. Williams, 822 F.2d 1174 (D.C. Cir. 1987) 20

United States v. Zelinka, 862 F.2d 92 (6th Cir. 1988) 11, 12, 20

Vaise v. Delaval, 99 Eng. Rep. 944 (K.B. 1785) . 18

Wiedemann v. Galiano, 722 F.2d 335 (7th Cir. 1983) 7, 15

LEGISLATIVE MATERIAL:

Federal Rules Of Evidence: Hearings On H.R. 5463 Before The Committee On The Judiciary, 93d Cong., 2d Sess. (1974) 15

TREATISES & COMMENTARY:

J. Weinstein & M. Berger, *Weinstein's Evidence* (1988) 17

Crump, *Jury Misconduct, Jury Interviews, And The Federal Rules Of Evidence: Is The Broad Exclusionary Principle Of Rule 606(b) Justified?*, 66 N. Car. L. Rev. 509 (1988) 18

Thompson, *Challenge To The Decisionmaking Process—Federal Rule Of Evidence 606(b) & The Constitutional Right To A Fair Trial*, 38 Sw. L.J. 1187 (1985) 10, 18

Note, *Clean Sweep of the New Trial Safeguard Against Prejudice From Unauthorized Communications With Jury Members*, 31 Wayne L. Rev. 1083 (1985) 11

Note, *Pre-Deliberations Juror Misconduct, Evidential Incompetence, And Juror Responsibility*, 98 Yale L.J. 187 (1988) 15, 18

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, A.O. Smith Harvestore Products, Inc., Hermitage Harvestore Systems, Inc., and Chuck Dowdy, respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered April 26, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is contained in the Appendix at App. 1.[2] The order entered by the District Court for the Eastern District of Tennessee is contained in the Appendix at App. 19.

JURISDICTION

The judgment of the Court of Appeals was entered on April 26, 1989.[3] By order of July 10, 1989, the Court of Appeals denied Petitioners' timely petition for rehearing with suggestion for rehearing en banc. (App. 17). This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Rule 606(b) of the Federal Rules of Evidence provides as follows:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of

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[2] Pursuant to Rule 24 of the Court of Appeals for the Sixth Circuit, the opinion was not recommended for publication. The fact that the Court of Appeals recommended that the opinion not be published, however, is not a bar to this Court's review. *See, e.g., Transamerican Freight Lines v. Brada Miller Freight Systems, Inc.*, 423 U.S. 28, 34 (1975).

[3] The Sixth Circuit remanded the case for a new trial on the issue of damages unless the Respondents accepted a remittitur of $350,000. (App. 16). Absent review by this Court, however, there will not be a third trial since on May 25, 1989, Respondents filed a motion in the District Court reflecting their acceptance of a remittitur of $350,000. The issuance of the mandate was stayed by the Sixth Circuit pending the filing of this Petition.

> anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Fed. R. Evid. 606(b).

STATEMENT OF THE CASE

The issues presented for review involve a conflict in the circuits regarding the presumption of prejudice afforded a party in a postverdict hearing once it is established that an extraneous and potentially prejudical communication was made to a juror. In particular, the circuits are divided with respect to whether this Court's decision in *Smith v. Phillips*, 455 U.S. 209 (1982), a case involving alleged juror bias, abolished the presumption of prejudice established in *Remmer v. United States*, 347 U.S. 227 (1954), a case involving an extraneous communication to a juror.

The issues in this case arise as the result of a judicial inquiry which was conducted several months after the second trial in which the jury rendered a verdict against Petitioners in the sum of $1,365,000. The first trial had also resulted in a substantial verdict against the Petitioners but the Sixth Circuit reversed and ordered a new trial. *Agristor Leasing v. Saylor*, 803 F.2d 1401 (6th Cir. 1986). Prior to the commencement of the second trial the

District Court granted Petitioners' motion in limine directing counsel and witnesses to refrain from making any references to the existence of the first trial in the presence of the jury.[4] Despite this precaution, however, the jury learned of the first trial through a trial spectator, who was a relative of one of the witnesses for the Respondents and a plaintiff in another action against the Petitioners. (JA 87). Thus, the judicial inquiry was convened for the purpose of determining the circumstances of that interested spectator's communication to the juror. At the inquiry each of the jurors was individually questioned about the communication by the trial judge in the presence of counsel for all parties, and the following testimony was elicited.

During a trial recess the spectator approached one of the jurors, whom she had known many years earlier, in the women's restroom and told her "we sat through this whole case two years ago." (JA 520-21, 556-59, 562). Before the spectator could say more, the juror informed her that she was not supposed to discuss the case and left the restroom. (JA 560). Upset by the incident, the juror reported the incident to the marshal. (JA 521).[5] The other

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[4] Specifically, the trial judge warned as follows:

> Yes, I don't want that done at all by anybody. It's not proper, and there is absolutely no proper—the way it was tried before has nothing at all to do with what the judgment should be of this jury now, and we all—I am telling everybody to prevent that from happening at all cost ....

(JA 437) ("JA" citations are to the Joint Appendix (two volumes) submitted by the parties to the Sixth Circuit. For the Court's convenience, a set of the Joint Appendix was transmitted herewith and lodged with the Clerk of the Court.).

[5] Although the District Court and the parties learned of the incident during the trial, Petitioners did not at that time know that the spectator who made the contact was more than a bystander

(Footnote continued on following page)

jurors' testimony is inconsistent with respect to whether and what they were told of the incident. (JA 512, 527, 539).[6]

At the conclusion of the judicial inquiry, and over the Petitioners' objection, the District Court addressed the following question to the jurors, as a group:

> On the verdict that you returned here in this case when you were jurors, did you decide it on the evidence that you heard in this courtroom and on the law that the Court gave you and on nothing else? If you did that, raise your right hand.

(JA 567). All jurors raised their hands.

The Petitioners then filed a motion for new trial pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, arguing that because the jury learned of the first trial they had been prejudiced and did not receive a fair trial.[7] Refusing to give the Petitioners the benefit of the

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[5] *continued*
and that she was related to a witness in the case who was also a plaintiff in a similar action. (JA 87). Accordingly, consistent with relevant authorities, the District Court and Court of Appeals both rejected Respondents' arguments that Petitioners waived their right to argue that they were entitled to a new trial as a result of the outside contact with the jury. *See, e.g., United States v. Moten*, 582 F.2d 654 (2d Cir. 1978).

[6] Included in the Petition's Appendix is a chart which summarizes the testimony of the jurors at the judicial inquiry and graphically illustrates the inconsistencies and discrepancies among their answers. (App. 20).

[7] Although the second trial lasted over two weeks and thirty witnesses testified, including ten experts on a myriad of complicated subjects such as engineering, veterinary science, and animal nutrition, the jury took barely two hours to return a verdict in favor of the Respondents for $875,000 in compensatory damages and prejudgment interest of $490,000. (JA 43, 488-90).

rebuttable presumption of prejudice established by this Court in *Remmer v. United States*, 347 U.S. 227 (1954), the District Court denied the motion for a new trial. Relying upon the jurors' assurances that they decided the case solely on the evidence, the district judge concluded that there was "no juror misconduct, that any contact which occurred was harmless, and that all jurors exhibited exemplary behavior at all times." (App. 19).

On appeal, the Sixth Circuit affirmed, holding that *Remmer* was not "controlling law," because it was "superseded" by *Smith v. Phillips*, 455 U.S. 209 (1982). (App. 11). *Phillips*, as earlier interpreted by the Sixth Circuit in *United States v. Pennell*, 737 F.2d 521 (6th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985), requires a showing of actual prejudice by the movant, as opposed to permitting a rebuttable presumption of prejudice once the outside communication is established. (App. 11-12). The Sixth Circuit's analysis and construction of *Phillips* as "superseding" *Remmer* is directly contrary to the following Courts of Appeals, each of which has expressly criticized and/or rejected *Pennell*'s interpretation of *Phillips* and *Remmer*:

Fourth:	*see, e.g., Haley v. Blue Ridge Transfer Co.*, 802 F.2d 1532, 1535-37 (4th Cir. 1986);
Ninth:	*see, e.g., United States v. Littlefield*, 752 F.2d 1429, 1431-32 (9th Cir. 1985);
District of Columbia:	*see, e.g., United States v. Butler*, 822 F.2d 1191, 1195 (D.C. Cir. 1987).

In addition, without specifically addressing the Sixth Circuit's position, the Courts of Appeal for the Second, Seventh, Eighth, Tenth and Eleventh Circuits, have con-

tinued to apply the *Remmer* presumption of prejudice since the time *Phillips* was decided.[8]

In its opinion, the Sixth Circuit also expressly rejected Petitioners' argument that *Pennell* and *Phillips* are limited to situations where the hearing on the issue of the outside juror contact occurs *before* the jury renders its verdict, and do not apply to a postverdict hearing as was the case here. (App. 12). The Sixth Circuit instead held that Rule 606(b) of the Federal Rules of Evidence does not prohibit postverdict questioning of jurors regarding the effect of an outside communication on their verdict. (App. 12-13). This position is in direct conflict with all of the other courts of appeals which have considered the issue.[9]

Recognizing that the Sixth Circuit's internal rules prohibited the panel which decided this case from overruling a prior panel's decision in *Pennell*, Petitioners filed a petition for rehearing en banc. The petition was denied with no judge voting in favor of an en banc rehearing. (App. 17).

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[8] *See, e.g., United States v. Wiley*, 846 F.2d 150, 157-58 (2d Cir. 1988); *DeGrave v. United States*, 820 F.2d 870, 872 (7th Cir. 1987); *United States v. Robinson*, 756 F.2d 56, 59 (8th Cir. 1985); *United States v. Hornung*, 848 F.2d 1040, 1043-46 (10th Cir. 1988); *United States v. Caporale*, 806 F.2d 1487, 1503 (11th Cir. 1986), *cert. denied*, 482 U.S. 917 (1987).

[9] *See, e.g., United States v. Jonnet*, 762 F.2d 16, 19-20 (3d Cir. 1985); *United States v. Delaney*, 732 F.2d 639, 643 n.6 (8th Cir. 1984); *Wiedemann v. Galiano*, 722 F.2d 335, 337 (7th Cir. 1983); *United States v. Brooks*, 677 F.2d 907, 913 (D.C. Cir. 1982); *United States v. Bagnariol*, 665 F.2d 877, 884-85 (9th Cir. 1981), *cert. denied*, 456 U.S. 962 (1982); *United States v. Greer*, 620 F.2d 1383, 1389 (10th Cir. 1980).

REASONS FOR GRANTING THE WRIT

I. Summary Of Reasons

The resolution of the issues presented in this Petition transcends this particular case and impacts the essence of our system of jurisprudence in criminal and civil litigation alike. As this Court observed in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984):

> One touchstone of a fair trial is an impartial trier of fact—"a jury capable and willing to decide the case solely on the evidence before it."

Id. at 554 (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)). *See also Mattox v. United States*, 146 U.S. 140, 150 (1892) ("Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear.").

An equally inviolate principle is the prohibition against courts and litigants inquiring into the jurors' deliberative processes.[10] That principle was codified in Rule 606(b) of the Federal Rules of Evidence which expressly prohibits inquiries into "any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that . . . or concerning the juror's mental processes in connection therewith." Fed. R. Evid. 606(b).

A dilemma, however, is created by the interaction between these two principles when a hearing regarding a possible extraneous communication with the jury is conducted *after* the jury has rendered its verdict, since it

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[10] *See Tanner v. United States*, 107 S. Ct. 2739, 2745-48 (1987); *Mattox v. United States*, 146 U.S. 140, 149 (1892).

may be difficult if not impossible to learn whether the verdict was affected by the extraneous contact without violating the prohibition against invading the jurors' mental processes. Thus, a choice must be made between countervailing policy considerations. On the one hand, truth and a fair trial to all litigants, an overriding goal of the judicial system, must be balanced against policy considerations on the other hand which underlie the prohibition against inquiring into the reasons for the verdict. Those include ensuring the finality of jury verdicts, protecting the integrity of the judicial process, discouraging jury harassment, as well as conserving judicial resources by avoiding lengthy or unnecessary proceedings on juror misconduct issues.

In *Remmer*, this Court resolved the tension between these considerations by adopting the so-called rebuttable presumption of prejudice—a direct or indirect communication or contact with the jury about a matter relating to the trial is deemed "presumptively prejudicial," unless the Government proves that the contact was harmless. 347 U.S. at 229.[11] The Sixth Circuit, however, in contrast to the other circuits, construes this Court's subsequent decision in *Phillips*, as having effectively overruled *Remmer* by eliminating the presumption of prejudice notwithstanding the fact that the juror misconduct in *Phillips* involved juror bias, not an extraneous communication. In doing so,

[11] Although *Remmer* was a criminal case, the presumption of prejudice established in that case has been uniformly applied in civil litigation as well. *See Krause v. Rhodes*, 570 F.2d 563, 568 (6th Cir. 1977), *cert. denied*, 435 U.S. 924 (1978); *Hobson v. Wilson*, 737 F.2d 1, 47-48 (D.C. Cir. 1984). *See, e.g., Abell v. Potomac Insurance Co.*, 858 F.2d 1104 (5th Cir. 1988); *Stephens v. South Atlantic Canners, Inc.*, 848 F.2d 484 (4th Cir.), *cert. denied*, 109 S. Ct. 564 (1988); *Rinker v. County of Napa*, 724 F.2d 1352 (9th Cir. 1983).

the Sixth Circuit has not only made it virtually impossible for a party to ever establish that an extraneous communication denied it a fair trial, but has sacrificed the objectives sought to be achieved by Rule 606(b)'s prohibition against inquiring into the jurors' mental processes. As observed by one commentator, such postverdict inquiries of jurors pose particular problems:

> The jurors now have a substantial self-interest in providing testimony that is consistent with the validity of their verdict. They have taken a public position on the issue and may be reluctant to provide testimony that they may have acted improperly in arriving at that position.

Thompson, *Challenge To The Decisionmaking Process—Federal Rule Of Evidence 606(b) & The Constitutional Right To A Fair Trial*, 38 Sw. L.J. 1187, 1218 (1985).[12]

The conflict between circuits created by the Sixth Circuit's position presents important considerations for this Court. First, the issues are not isolated but are occurring and promise to reoccur in both criminal and civil contexts. Second, further development by future decisions in other circuits is unlikely to cause the Sixth Circuit to yield in

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[12] *Accord McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 558 (1984) (Brennan, J., concurring) ("the bias of a juror will rarely be admitted by the juror himself"); *Smith v. Phillips*, 455 U.S. 207, 231-32 (1982) (Marshall, J., dissenting) ("It is the nature of the practices here challenged that proof of actual harm, or lack of harm is virtually impossible to adduce.") (quoting *Peters v. Kiff*, 407 U.S. 493, 504 (1972)); *Irvin v. Dowd*, 366 U.S. 717, 728 (1961) (Court observed that despite a juror's sincerity when he says he can be fair, the "psychological impact requiring such a declaration before one's fellows is often its father."). *See also United States v. Heller*, 785 F.2d 1524, 1527 (11th Cir. 1986) (jurors' denials are an insufficient basis on which to overcome presumption of prejudice); *Rinker v. County of Napa*, 724 F.2d 1352, 1354 (9th Cir. 1983) (juror's affidavit stating that she was not affected by the contact did not rebut presumption of prejudice).

its minority interpretation in light of its refusal to do so to date in the face of explicit criticism by courts and commentators[13] and its several recent decisions reaffirming its position.[14]

Accordingly, to avoid a continuation of inconsistent applications and interpretations of *Remmer*, *Phillips*, and Rule 606(b) in lower court decisions affecting substantial numbers of criminal and civil litigants, this Court should grant review of this case to determine: (1) whether the Sixth Circuit erred in holding that Petitioners were not entitled to the *Remmer* presumption of prejudice once they established that the extraneous communication about the prior trial was made to one of the jurors, and (2) whether the trial judge violated Rule 606(b) when it inquired of the jurors not only about the extraneous communication itself but also its effect on their verdict.

II. The Sixth Circuit's Decision Is In Direct Conflict With Decisions Of Other Circuits

The Sixth Circuit squarely acknowledged that "if *Remmer* were controlling law, the burden would have been on the [Respondents] to establish lack of prejudice from the unauthorized contact." (App. 11). But the Court of Appeals continued to follow its decision in *United States v. Pennell*, 737 F.2d 521 (6th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985), where it held:

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[13] *See, e.g., United States v. Littlefield*, 752 F.2d 1429, 1431 (9th Cir. 1985). *See* Note, *Clean Sweep of the New Trial Safeguard Against Prejudice From Unauthorized Communications With Jury Members*, 31 Wayne L. Rev. 1083, 1096-1100 (1985).

[14] *See, e.g., United States v. Cooper*, 868 F.2d 1505, 1523 (6th Cir. 1989); *United States v. Zelinka*, 862 F.2d 92, 95 (6th Cir. 1988); *United States v. Crane*, No. 86-3917, slip op. (6th Cir. Feb. 18, 1988).

> In light of *Phillips*, the burden of proof rests upon a defendant to demonstrate that unauthorized communications with jurors resulted in actual juror partiality. Prejudice is not to be presumed.

Id. at 532. Similarly, in *United States v. Zelinka*, 862 F.2d 92 (6th Cir. 1988), cited and relied upon in the decision in this case (App. 12), the Sixth Circuit reaffirmed its view that *Pennell* controls, expressly observing that:

> This court has consistently held that *Smith v. Phillips* reinterpreted *Remmer* to shift the burden of showing bias to the defendant rather than placing a heavy burden on the government to show that an unauthorized contact was harmless.

Id. at 95. Significantly, the Sixth Circuit has not charted its own course oblivious to the fact that its interpretation and application of *Phillips* differs from decisions by other courts of appeals. In *Zelinka*, for example, the Sixth Circuit acknowledged that two courts of appeals had expressly disagreed with *Pennell* and still others continue to apply the *Remmer* presumption. *Id.*[15]

What the Sixth Circuit ignored in *Zelinka*, however, and expressly disavowed in this case, is the critical distinction between preverdict and postverdict inquiries regarding juror misconduct. (App. 12-13). As Petitioners argued below and as all of the other circuits which have addressed the issue recognize, the actual bias test dis-

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[15] The Sixth Circuit also believed, however, that the First Circuit agreed with its position. 862 F.2d at 95 (citing *Neron v. Tierney*, 841 F.2d 1197, 1200 (1st Cir. 1988), and *United States v. DeLutis*, 722 F.2d 902, 909 (1st Cir. 1983)). But *Neron* and *DeLutis*, like *Phillips*, involved issues of potential juror bias, not potential prejudice as a result of an extraneous communication, like the situation here and in *Remmer*.

cussed in *Phillips* cannot be applied in a federal postverdict hearing because it would typically result in a violation of Rule 606(b) in order to satisfy the test. *See, e.g., Haley v. Blue Ridge Transfer Co.*, 802 F.2d 1532, 1535-36 n.5 (4th Cir. 1986) ("proof of 'actual' prejudice would have been impossible to uncover in this case without contravening Federal Rule of Evidence 606(b)"); *Owen v. Duckworth*, 727 F.2d 643, 646 (7th Cir. 1984) ("A determination of jury prejudice is complicated in the federal courts by the proscription against questioning jurors directly about the effect of the outside contact on their deliberations. Fed. R. Evid. 606(b)."); *United States v. Greer*, 620 F.2d 1383 (10th Cir. 1980) ("The effect of [Rule 606(b)] is that a presumption of prejudice cannot be overcome once a jury has reached its verdict."). *See also Attridge v. Cencorp Division of Dover Technologies Int'l, Inc.*, 836 F.2d 113 (2d Cir. 1987).[16]

This Court was not required to consider the effect of Rule 606(b) on a litigant's rights in a postverdict hearing regarding juror misconduct in *Phillips*. *Phillips* involved a petition for writ of habeas corpus, seeking relief from

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[16] In addition to the distinction between a preverdict and postverdict hearing, this Court's decision in *Phillips* involved juror bias, not an extraneous communication with jurors. The Fourth Circuit, for example, has found *Phillips* inapplicable to extraneous communication cases, explaining as follows:

> *Phillips* and all of our cases following it are distinguishable from the present case because they address intrinsic juror bias subject to revelation during voir dire. . . . We see a basic difference between the beliefs, feelings, preferences and general personality traits that every juror carries into the courtroom and the power of after-acquired extraneous information . . . to infect and extirpate impartiality from the fact-finding process.

Haley, 802 F.2d at 1536 n.5. Indeed, in *Phillips* this Court expressly observed that voir dire, though not infallible, is a safeguard of juror impartiality. 455 U.S. at 217.

a state court conviction because of alleged juror bias. Significantly, in *Phillips* the postverdict inquiry regarding the alleged juror bias was conducted in state court. 455 U.S. at 217. Thus, Rule 606(b) was not implicated in *Phillips* because the state court findings of fact are "presumptively correct" and the legal issue in the habeas context was restricted to whether the state court provided the petitioner with an *opportunity* to prove prejudice consistent with due process. *See Neron v. Tierney*, 841 F.2d 1197, 1199 (1st Cir.), *cert. denied*, 109 S. Ct. 90 (1988) ("Section 2254(d)(2) does not allow us to superimpose federal choices upon the state courts merely because we think some 'other' procedure might have been 'better'.").

In stark contrast to the state court proceeding at issue in *Phillips*, there is no question that Rule 606(b) applied to the judicial inquiry in this case.[17] Thus, *Phillips* cannot provide support for the Sixth Circuit's approval of the trial judge's flagrant violation of Rule 606(b). Rather,

[17] In fact, in overruling Petitioners' objection to the question, the District Court commented as follows:

> THE COURT: . . . I'm going to do what you tell me I shouldn't do on 606. I'm going to bring all six jurors in here and ask them if their verdict was a verdict that they found under all of the evidence and the law I instructed them, and if I shouldn't do that, then the Sixth Circuit will say it was error for me to do it and I've exercised myself for nothing.
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> * * *
>
> THE COURT: I'm fixing to ask these six jurors did they decide this case on the evidence they heard in this courtroom and on the law that I gave them and nothing else, and I want to know what their answer is and if it's error, then we'll strike it from the record as though it didn't happen and you can correct the error when you get up to the Sixth Circuit, but if I don't ask it they may send it back for me to ask them.

(JA 554, 566).

the only rationale offered is the Sixth Circuit's misapprehension of the Rule's so-called extraneous prejudicial information exception. That exception expressly exempts from the Rule's general prohibition "a juror['s testimony] on the question [of] whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." Fed. R. Evid. 606(b). At first glance, this exception might suggest, as the Sixth Circuit has decided, that when testifying about extraneous information a juror can also be questioned about the effect of that information on the jury's deliberations. That construction, however, cannot be reconciled with an examination of the legislative history, case law or legal commentary.[18]

Moreover, the Sixth Circuit's application of Rule 606(b)'s extraneous information exception is, like its interpretation of *Phillips*, in direct conflict with other circuits. *See Wiedemann v. Galiano*, 722 F.2d 335, 337 (7th Cir. 1983) ("The Rule [606(b)] does allow jurors to testify as to whether extraneous information or an outside influence reached them. However, it prohibits jurors from giving post-verdict testimony as to whether their deliberations, in fact, were prejudiced by the extraneous information or outside influence."); *United States v. Bagnariol*, 665 F.2d 877, 884-85 (9th Cir. 1981), *cert. denied*, 456 U.S. 962 (1982) ("[Jurors] may not be questioned about the deliberative process or subjective effects of extraneous information, nor can such information be considered by the trial or appellate courts."); *United States v. Bassler*, 651 F.2d 600,

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[18] *See, e.g., Tanner v. United States*, 107 S. Ct. 2739 (1987); *Federal Rules Of Evidence: Hearings On H.R. 5463 Before The Committee On The Judiciary*, 93d Cong., 2d Sess. (1974); Note, *Pre-Deliberations Juror Misconduct, Evidential Incompetence, And Juror Responsibility*, 98 Yale L.J. 187 (1988).

603 (8th Cir.), *cert. denied*, 454 U.S. 944 (1981) ("Rule 606(b) precludes the district court from investigating the subjective effects of any extrinsic material on the jurors . . ."). *Accord United States v. Jonnet*, 762 F.2d 16, 19 (3d Cir. 1985); *United States v. Delaney*, 732 F.2d 639, 643 n.6 (8th Cir. 1984); *United States v. Brooks*, 677 F.2d 907, 913 (D.C. Cir. 1982).

Without addressing the conflicting decisions of other circuits and without citation of any authority supporting its position, the Sixth Circuit attempted to rationalize its holding as follows:

> Presumably, under the *Remmer* rule, the party seeking to preserve the judgment would be allowed to demonstrate the *absence* of prejudice by questioning the jurors, post-verdict, under the authority of the Rule 606(b) exception. However, the defendants assert that the post-verdict questioning of jurors to establish the *existence* of prejudice under the *Phillips/Pennell* rule would violate Rule 606(b). Plainly, if post-verdict questioning of jurors was permissible when the *Remmer* presumption was applicable, such post-verdict questioning is permissible under *Phillips* and *Pennell*.

(App. 12-13) (emphasis original). This statement reflects two fundamental errors. First, it ignores the crucial distinction between questioning jurors about the *fact* of the extraneous communication and questioning them about the *effect* of the extraneous communication on their deliberations. Second, the Sixth Circuit seemingly believes that it is permissible to question jurors in order to establish the *absence* of prejudice.[19]

[19] The Sixth Circuit also erroneously assumed that questioning the jurors about the effect of the communication on their verdict

(Footnote continued on following page)

As the result of these errors, the Sixth Circuit's application of Rule 606(b) stands in sharp and irreconcilable conflict with other circuits which have held that an inquiry into jurors' mental processes is prohibited by Rule 606(b) irrespective of whether the result confirms or impeaches their verdict. *See, e.g., United States v. Bassler*, 651 F.2d 600, 603 (8th Cir. 1981); *United States v. Greer*, 620 F.2d 1383, 1389 (10th Cir. 1980). *Accord United States v. Jelsma*, 630 F.2d 778, 779 (10th Cir. 1980). *See also* 3 J. Weinstein & M. Berger, *Weinstein's Evidence*, ¶606[04] at 606-29-30 (1988).

In the final analysis, there is no question that Petitioners would have been entitled to a new trial had the *Remmer* presumption of prejudice test been applied in this case. There is likewise no question that a new trial would have followed had the courts below not considered the jurors' affirmative responses to the trial judge's question with respect to whether their verdict was based solely on the evidence admitted at trial. In fact, had the Respondents' dairy farm in this case been located just 50 to 70 miles south, in Alabama or Georgia instead of Tennessee, the result would not have been the same. Rather, under Eleventh Circuit precedent, the *Remmer* presumption would have been available to the Petitioners and the judge would not have been permitted to ask the

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[19] *continued*

would have been permissible under *Remmer*, which was decided before Rule 606(b) was enacted. However, limiting the inquiry of jurors to the fact of an extraneous communication and not its impact, if any, on the verdict, is also supported by the common law rule which preceded the adoption of the Federal Rules of Evidence. *See, e.g., Tanner v. United States*, 107 S. Ct. 2739, 2745-48 (1987); *Mattox v. United States*, 146 U.S. 140, 149 (1892). *See generally* 3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶606[03] (1988).

question regarding the jury's deliberative process. *See United States v. Heller*, 785 F.2d 1524, 1528 (11th Cir. 1986). Hence, a new trial would have been mandated. It is submitted that such disparate results in the federal courts relating to the fundamental right of a fair trial should be predicated on more than geography.

III. The Issues Presented Are Important To Civil and Criminal Litigants And The Judiciary

The issues presented in this Petition are being confronted by federal courts throughout the country on a regular basis. The importance of a fair trial decided by jurors free from extraneous contacts and communications that may be prejudicial is obvious. Likewise, little need be said about the importance of protecting the sanctity of the jury room and the secrecy of the jurors' deliberations. Those goals not only provide the underpinnings to Rule 606(b), but have been steadfastly followed since the time of Lord Mansfield.[20] Acknowledging the importance of the policies affected by these issues, however, is far easier than resolving them since their resolution necessarily involves balancing equally laudable and competing policies.[21]

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[20] *See Vaise v. Delaval*, 99 Eng. Rep. 944 (K.B. 1785). *See generally* Crump, *Jury Misconduct, Jury Interviews, And The Federal Rules Of Evidence: Is The Broad Exclusionary Principle Of Rule 606(b) Justified?*, 66 N. Car. L. Rev. 509, 513-20 (1988); Thompson, *supra* p. 10, at 1189-95.

[21] One commentator aptly observed that:

> The attempt to effectuate significant policy considerations affecting vital substantive rights by rules of competency [Rule 606(b)] is like trying to eat soup with a fork. Although by proper manipulation some nourishment can be supplied, the process is hit or miss with substantial and unacceptable side effects.

Thompson, *supra* p. 10, at 1221-22. *See also* Note, *supra* note 18, at 187 ("Rule 606(b) seems designed to maximize tension between preserving the jury and preserving justice.").

The resolution reached by the majority of the circuits is that the price to be paid in order to preserve the integrity of the jury system is a lessening of the finality of jury verdicts and a potential increase in posttrial litigation.[22] The Sixth Circuit, on the other hand, is resolutely unwilling to pay that price and requires proof of actual prejudice even at the expense of invading the jurors' mental processes.

In addition, other circuits have not yet directly confronted the issue of juror misconduct in a postverdict setting and/or will be faced with a choice between these conflicting approaches.[23] Alternatively, absent guidance from this Court, these circuits may opt for their own variation of the required balancing of the competing public policies.[24]

In sum, this Court's decision in *Phillips* is being inconsistently interpreted and applied in cases involving juror bias,[25] juror statements on voir dire,[26] extraneous com-

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[22] *See* cases cited at page 6 and note 8, *supra*.

[23] The First and Third Circuits have not yet decided the issue in an extraneous communication setting. And, the Fifth Circuit expressly refused to decide the issue in a case where the extraneous communication was caused by the defendant himself. *See Abell v. Potomac Insurance Co.*, 858 F.2d 1104, 1147 (5th Cir. 1988).

[24] Congress, the only other alternative to a resolution of this conflict, is not particularly well suited to dealing with these issues. A clarifying amendment, for example, of Rule 606(b) would not be sufficient. Although such an amendment would prevent future invasions of jurors' mental processes regarding extraneous communications, it would not, without more, reinstate the *Remmer* rebuttable presumption in the Sixth Circuit and any other circuits which may adopt its interpretation of *Phillips*.

[25] *See, e.g., United States v. Kabir*, Nos. 87-3850/3851, slip op. (6th Cir. Dec. 28, 1988), *cert. denied*, 109 S. Ct. 1325 (1989).

[26] *See, e.g., Neron v. Tierney*, 841 F.2d 1197 (1st Cir.), *cert. denied*, 109 S. Ct. 90 (1988); *Baca v. Sullivan*, 821 F.2d 1480 (10th Cir. 1987).

munications[27] in circumstances involving both preverdict[28] and postverdict[29] hearings. Yet, in *Phillips* all this Court had before it was an issue of juror bias in the context of a habeas proceeding where the hearing had been conducted in state court so that Rule 606(b) was not applicable. As a result, seven years later, clarification of the rule in *Phillips* is now required, as well as guidance regarding the appropriate presumptions and burdens of proof in federal postverdict judicial inquiries involving incidents of potential juror misconduct. This case affords the Court with the opportunity to provide the requisite guidance and clarification.

CONCLUSION

For the foregoing reasons, this Petition For Writ Of Certiorari should be granted.

Dated: August 25, 1989

Respectfully submitted,

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[27] *See, e.g., United States v. Zelinka*, 862 F.2d 92 (6th Cir. 1988); *United States v. Ramos*, 861 F.2d 461 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 1353 (1989).

[28] *See, e.g., United States v. Crane*, No. 86-3917, slip op. (6th Cir. Feb. 18, 1988); *United States v. Williams*, 822 F.2d 1174 (D.C. Cir. 1987).

[29] *See, e.g., United States v. Kabir*, Nos. 87-3850/3851, slip op. (6th Cir. Dec. 28, 1988), *cert. denied*, 109 S. Ct. 1325 (1989).

APPENDIX

[Filed April 26, 1989]

Nos. 87-5990/6002
88-5279/5314

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JAMES SAYLOR and KAAREN SAYLOR d/b/a UDDER NONSENSE DAIRY,

Defendants, Counterplaintiffs-Third-Party Plaintiffs-Appellees,

v.

A. O. SMITH HARVESTORE PRODUCTS, INC., (87-5990/88-5279); HERMITAGE HARVESTORE SYSTEMS, INC., and CHUCK DOWDY (87-6002/88-5314),

Third-Party Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

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BEFORE: KEITH, JONES and GUY, Circuit Judges.

PER CURIAM. The third-party defendants appeal the jury verdict for the third-party plaintiffs, including the pre-judgment interest award, in this diversity action for strict product liability and fraudulent misrepresentation.

For the reasons that follow, we affirm the district court's judgment as to the liability and compensatory damages issues. However, because the record reflects that the prejudgment interest award was improperly calculated, we find it necessary to order a remittitur of a portion of that award.

I.

At all times relevant to this lawsuit, the third-party plaintiffs-appellees, James and Kaaren Saylor ("the Saylors") were the owners and operators of the "Udder Nonsense Dairy" in New Bedford County, Tennessee. Third-party defendant-appellant, A.O. Smith Harvestore Products, Inc. ("AOSHPI"), is a New York corporation engaged in the design and manufacture of farm feed storage systems. Third-party defendant-appellant Hermitage Harvestore Products, Inc. ("Hermitage") is a Tennessee corporation engaged in the business of selling and distributing Harvestore systems designed and manufactured by AOSHPI. Third-party defendant-appellant Chuck Dowdy ("Dowdy") is a sales agent for Hermitage.

In January or February of 1980, the Saylors were approached by Dowdy about purchasing Harvestore feed storage structures and related equipment manufactured by AOSHPI for use on their dairy farm. The Harvestore system was represented through AOSHPI literature and by Dowdy as an "oxygen limiting" system which was designed to keep stored feed virtually airtight, thereby preventing spoilage and yielding better feed and increased milk production. Dowdy showed the Saylors an AOSHPI film and a book published by AOSHPI, both of which touted the oxygen limiting capabilities of Harvestore structures. The promotional material defined "oxygen limiting"

as "[a] feed storage system in which ensiled feeds are protected from the access of oxygen."

In March of 1980, the Saylors signed an agreement with Hermitage to obtain the Harvestore system. In May of 1980, the Saylors entered a long-term lease with AgriStor Leasing Company ("AgriStor"), which financed the arrangement. The Harvestore structures were in place and operating on the Saylors' farm by July of 1980. After the first month, however, James Saylor began noticing problems in the dairy herd, including decreased milk production, a lack of energy in the cows, and swelling in their joints.

During 1981 several veterinarians came to the Saylors' farm and examined the dairy herd; however, none of them could determine the source of the problem. Although the Saylors stopped using the Harvestore structures in February of 1982, the health of the herd continued to decline, resulting in lower milk productivity and the death of a number of cows. Eventually, the Saylors were forced to slaughter the dairy herd and close down their farm. When they defaulted on their lease payments, AgriStor repossessed the equipment.

On October 28, 1983, AgriStor filed suit against the Saylors in the United States District Court for the Eastern District of Tennessee, seeking the balance due under the lease. The Saylors answered and filed a third-party complaint against Dowdy, Hermitage and AOSHPI, seeking damages for manufacturing a defective product, and for false and fraudulent misrepresentations about the product. At the beginning of the trial, the Saylors confessed judgment on the AgriStor claim, and the district court granted summary judgment to AgriStor for the remaining payments under the lease. The case was tried to a jury on the Saylors' claims of a defective product and fraudulent

misrepresentation. The jury found the defendants jointly and severally liable to the Saylors, and awarded compensatory and punitive damages in the amount of $1 million.

The defendants appealed the judgment to this court, arguing that the district court had erred in refusing to give a jury instruction on the statute of limitations, and in refusing to direct a verdict in defendants' favor on the fraudulent misrepresentation claims. Regarding the latter issue, the defendants argued that certain language in the lease agreement expressly disclaimed that the Saylors had relied upon any representations made by the defendants in purchasing the Harvestore equipment. The defendants contended that this contractual language precluded the Saylors from proving reliance, thereby foreclosing their fraudulent misrepresentation claims.

This court reversed the district court's judgment and remanded, agreeing with the defendants that the jury should have been instructed on the statute of limitations issue. *Agristor Leasing v. James Saylor*, 803 F.2d 1401, 1405-06 (6th Cir. 1986) ("*Saylor I*"). However, we rejected the defendants' assertions regarding the force of the "disclaimer-of-reliance" language in the contract. Noting a split of authority in Tennessee as to whether such disclaimers were effective to shield a defendant from liability for fraud, this court deferred to the district judge's interpretation of state law and concluded that "the district court did not err in denying summary judgment and a directed verdict on the basis of the disclaimers of reliance." *Id.* at 1407.

On remand, the defendants filed a motion *in limine* seeking to prevent any reference to the prior proceedings in the presence of the jury. This motion was granted. In addition, the defendants sought to preclude the Saylors from presenting evidence regarding pre-judgment interest

damages. The district court ultimately granted this motion, stating that if the jury awarded compensatory damages, the *court* would decide whether pre-judgment interest should be awarded and in what amount.

The second trial commenced on June 8, 1987. In the second week of trial, during a brief recess in the proceedings, one of the jurors was approached by an old acquaintance who was a spectator at the trial. The spectator, who was a blood relative of one of the Saylors' expert witnesses, greeted the juror in the restroom and told the juror that she had "sat through this whole case two years ago." The juror promptly told the spectator that she was not allowed to talk about the case and walked out of the restroom. The juror then informed the court marshal about what had taken place, and the marshal informed the court and counsel for the parties. Counsel for the defendants questioned the spectator about the incident, but did not ask that the juror be replaced, or request any other relief at that time. According to the defendants, they did not learn of the spectator's relation to the Saylors' witness until the trial had concluded.

At the close of the evidence, the defendants moved for a directed verdict on the fraudulent misrepresentation claims, again asserting that the disclaimer language in the lease contract precluded the Saylors from recovering on those claims. This motion was denied. The defendants also requested that the jury be given a special verdict form, citing the fact that multiple claims were being asserted against multiple defendants. The district court also denied this request.

Despite his pre-trial evidentiary ruling concerning pre-judgment interest, and despite reaffirming that ruling during trial, the district judge decided at the close of the

proofs to submit this issue to the jury. The district judge therefore instructed the jury, in accordance with Tennessee law, that they possessed the discretion whether to award pre-judgment interest, and that they could award such interest on the amount of compensatory damages "at any rate of interest [they found] to be appropriate up to but not greater than 10 percent per annum." J. App. at 484-85.

On June 24, 1987, the jury returned a general liability verdict against all defendants, awarding the Saylors $875,000.00 in compensatory damages and $490,000.00 in pre-judgment interest. The latter figure represented interest at the rate of 8 percent per year *on $875,000.00* over seven years.

The defendants filed various post-trial motions, including a motion for judgment notwithstanding the verdict and a motion for a remittitur of the damages award. In addition, the defendants filed a motion seeking to interview the jurors concerning the extraneous juror contact, as well as a motion for a judicial inquiry into this matter. While all of these motions were denied initially, the district judge later decided to conduct an inquiry into the circumstances surrounding the extraneous juror contact.

On January 21, 1988, the district judge conducted an inquiry at which each of the jurors was examined individually. All of the witnesses to the incident, including the juror, the spectator, and an employee of the court who witnessed the contact, either testified or submitted an affidavit. All stated that the juror promptly terminated the conversation upon hearing that the spectator had attended the prior trial. Moreover, none of the witnesses to the incident stated that the juror was informed of the outcome of the prior trial. On questioning by the trial

judge, each of the jurors stated under oath that her vote was based solely on the evidence presented at trial and the instructions provided by the court.

After the hearing, the defendants filed a motion for a new trial pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. On February 8, 1988, the district judge denied that motion, concluding that "there was absolutely no juror misconduct, that any contact which occurred was harmless, and that all jurors exhibited exemplary behavior at all times." J. App. at 55.

II.

In their first argument, the defendants assert that the district court erred in denying their motion for a directed verdict on the fraudulent misrepresentation claims. They maintain that the disclaimer-of-reliance language in the lease agreement forecloses recovery on these claims because reliance is an essential element of fraud. The defendants also attempt to distinguish between contractual provisions purporting to disclaim *liability* and those purporting to disclaim reliance, asserting that Tennessee law disfavors only the former. Finally, the defendants contend that our decision in *Saylor I* does not squarely address the effect of reliance disclaimers under Tennessee law, and that the law-of-the case doctrine therefore is not applicable.

The pertinent terms in the lease contract provide as follows:

* * *

> 10. The Seller hereunder is an independent contractor none of whose representations are binding on the Manufacturer.

* * *

14. Preamble – Buyer understands the conditions of the use of the products and is not relying on the skill or judgment of the Manufacturer or Seller in selecting them because Buyer acknowledges that farming and livestock feeding results are very much the product of individual effort combined with various climatic, soil, water, growing and feeding conditions which are beyond the control of the Manufacturer and Seller. Buyer recognizes that any advertisements, brochures, and other written statements which he may have read, including any farm profit plan which may have been shown to him, as well as any oral statement which may have been made to him, concerning the potential of the Harvestore and or Slurrystore units and allied machinery and equipment, are not guarantees and he has not relied upon them as such because the products will be under Buyer's exclusive management and control . . . .

* * *

ACKNOWLEDGEMENT AND RELIANCE

I HAVE READ AND UNDERSTOOD THE TERMS AND CONDITIONS OF THIS PURCHASE ORDER INCLUDING THE WARRANTIES. DISCLAIMERS AND TERMS AND CONDITIONS HEREIN GIVEN TO ME, EITHER BY THE MANUFACTURER OR THE SELLER. I RELY ON NO OTHER PROMISES OR CONDITIONS AND REGARD THAT AS REASONABLE BECAUSE THESE ARE FULLY ACCEPTABLE TO ME.

J. App. at 824a (emphasis added).

The defendants assert that in *Saylor I*, we do not squarely address the effect of such a *reliance* disclaimer under Tennessee law. However, the contractual provisions at issue in *Saylor I* are the identical provisions involved in this case, and the *Saylor I* court held that "the district court did not err in denying summary judgment and a directed verdict on the basis of the *disclaimers of reliance.*" 803 F.2d at 1407 (emphasis added). Moreover, the same issue was presented to this court in *Agristor Leasing v. William Dayon Taylor*, 865 F.2d 1267 (6th Cir. 1989), wherein the court stated as follows:

> AOSHPI argues [that] the district court erred in failing to give effect to its "disclaimer of reliance." AOSHPI attempts to distinguish its "disclaimer of reliance" from the "disclaimer of liability" in the Agristor lease in *Saylor* [I]. We find the claimed distinctions to be ineffective in light of *Saylor* [I] and Tennessee law, which gives no effect to disclaimers in the presence of fraud or negligent misrepresentations.

Slip op. at 10. Contrary to the defendants' assertions, the *Saylor I* court expressly held that the contractual disclaimer involved in this case was not effective to shield the defendants from liability for fraudulent misrepresentation. Moreover, we have since held in the *Taylor* decision that the defendants' claimed distinction between liability disclaimers and reliance disclaimers is not effective. Given the decisions in *Saylor I* and *Taylor*, we are bound to reject the defendants' arguments concerning this issue.

III.

The defendants next contend that the district court erred in denying their motion for a new trial, which was filed

after the judicial inquiry into the circumstances and effect of the outside juror contact. The defendants assert that the juror's contact with the spectator was presumptively prejudicial to them, and that a new trial was required because the plaintiffs did not rebut that presumption of prejudice.

The defendants filed their motion for a new trial pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. Rule 60(b) states, in pertinent part, as follows:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: .... (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b) .... (6) any other reason justifying relief from the operation of the judgment.

The decision whether to grant a Rule 60(b) motion is committed to the sound discretion of the trial court, and the granting or denial of such a motion may not be reversed unless the trial court abuses its discretion. *In Re Salem Mortgage Co.*, 791 F.2d 456, 459 (6th Cir. 1986).

The defendants rely on *Remmer v. United States*, 347 U.S. 227 (1954), for the proposition that unauthorized contacts with jurors are presumptively prejudicial, and that the burden is on the party seeking to preserve the judgment to show lack of prejudice. In *Remmer*, the Supreme Court stated that:

> In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed

> presumptively prejudicial, if not made in pursuance of known rules of the court and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

347 U.S. at 451. While *Remmer* was a criminal case, the doctrine of "presumed prejudice" also has been applied in the civil context. *See, e.g., Krause v. Rhodes*, 570 F.2d 563, 568 (6th Cir. 1977), *cert. denied*, 435 U.S. 924 (1978); *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985). Therefore, if *Remmer* were controlling law, the burden would have been on the Saylors to establish lack of prejudice from the unauthorized contact. However, in *United States v. Pennell*, 737 F.2d 521 (6th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985), this court interpreted a more recent Supreme Court decision, *Smith v. Phillips*, 455 U.S. 209 (1982), as superseding the *Remmer* rule. Although *Phillips* did not expressly overrule *Remmer*, the *Phillips* Court stated that the "remedy for allegations of juror partiality is a hearing in which the *defendant has the opportunity to prove bias.*" 455 U.S. at 215 (emphasis added). Interpreting this language in *Pennell*, we stated:

> Thus, the Court held that *Remmer* does not govern the question of the burden of proof where potential jury partiality is alleged. Instead, *Remmer* only controls the question of how the district court should proceed where such allegations are made .... In light of *Phillips*, the burden of proof rests upon a defendant to demonstrate that unauthorized communications with jurors resulted in actual juror partiality. *Prejudice is not to be presumed.*

737 F.2d at 532 (emphasis added; footnote omitted). *Accord United States v. Zelinka*, 862 F.2d 92, 95 (6th Cir. 1988) (noting that *Pennell* provides the controlling rule in this Circuit).

The defendants in this case argue that *Phillips* and *Pennell* apply only to pre-verdict hearings for juror prejudice, and that *Remmer* continues to govern post-verdict hearings for juror prejudice. While admitting that nothing in *Pennell* so limits its holding, the defendants assert that applying *Pennell* to post-verdict hearings would violate Rule 606(b) of the Federal Rules of Evidence. Rule 606(b) provides, in pertinent part, as follows:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, *except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.*

(emphasis added).

Given the above-emphasized language, the defendants' interpretation of *Pennell* must fail. Presumably, under the *Remmer* rule, the party seeking to preserve the judgment would be allowed to demonstrate the *absence* of prejudice by questioning the jurors, post-verdict, under the authority of the Rule 606(b) exception. However, the defendants assert that the post-verdict questioning of jurors to establish the *existence* of prejudice under the *Phillips/Pennell* rule would violate Rule 606(b). Plainly, if post-verdict

questioning of jurors was permissible when the *Remmer* presumption was applicable, such post-verdict questioning is permissible under *Phillips* and *Pennell*. The interpretation and application of Rule 606(b) does not turn upon who has the burden of proof.

Because the holding in *Pennell* applies equally well to pre-verdict and post-verdict hearings for juror prejudice, the defendants in this case bore the burden of proving that the extraneous juror contact resulted in actual prejudice. Since the defendants failed to carry that burden, the district court did not abuse its discretion in denying their motion for a new trial on this ground.

IV.

The defendants' final argument concerns the manner in which the district court submitted the pre-judgment interest issue to the jury. As stated earlier, the district judge made a pre-trial ruling that the parties could not introduce evidence on this issue because the court, not the jury, would determine whether such damages should be awarded and in what amount. The district court reaffirmed that ruling during trial. Nevertheless, at the close of the evidence, the court decided to submit the issue to the jury. The jury subsequently awarded $490,000.00 of pre-judgment interest on compensatory damages of $875,000.00. The jury applied an interest rate of eight per year [sic] to the *total* compensatory damage award from July of 1980, when the Saylors purchased the Harvestore equipment, to June of 1987, the date of the jury's verdict. The pre-judgment interest award thus represents $70,000 per year for seven years.

The defendants contend that the pre-judgment interest award is improper because the Saylors did not suffer *all*

of their damages as soon as they leased the Harvestore equipment. They argue that the Saylors suffered gradual losses from 1980 until 1985, when they slaughtered the herd and closed down the farm. The defendants further assert that the jury's error in this regard requires a new trial, rather than a remittitur, because the absence of any record evidence on this issue precludes a mathematical computation of the proper amount of pre-judgment interest. Moreover, the defendants assert that the district court's refusal to submit special interrogatories to the jury forecloses a remittitur because the jury's verdict does not indicate what portion of the compensatory damage award is for property losses (arising from the strict liability claims) and what portion is for economic losses (arising from the fraud claims). In the defendants' view, this fact precludes this court from determining when the various losses were suffered, thereby preventing an accurate determination of the proper amount of pre-judgment interest.

Tennessee Code Annotated § 47-14-123 (1980) states:

> Pre-judgment interest, i.e., interest as an element of, or in the nature of, damages, as permitted by the statutory and common laws of the states as of April 1, 1979 may be awarded by courts or juries in accordance with the principles of equity at any rate not in excess of a maximum effective rate of ten percent (10%) per annum . . . .

(emphasis added). Under this provision, courts and juries possess wide discretion in the awarding of pre-judgment interest, and their award should not be disturbed " 'unless the record discloses a manifest and palpable abuse of discretion.' " *Schoen v. J.C. Bradford & Co.*, 667 S.W.2d 97, 101 (Tenn. App. 1984) (quoting *Engert v. Peerless Insurance Co.*, 382 S.W.2d 541, 550 (Tenn. App. 1964)). This

court has held recently that "[w]here a jury grants a particular damage award and the district court refuses to disturb that finding, an appellate court should be certain indeed that the award is contrary to all reason before it orders a remittitur or a new trial." *In Re Lewis*, 845 F.2d 624, 635 (6th Cir. 1988).

Despite this deferential standard of review, we conclude that the jury abused its discretion in calculating the prejudgment interest award. Under Tennessee law, "[p]rejudgment interest on a property damage award accrues from the date that the defendant's tortious conduct effectively operates to destroy or diminish either the resale value, the rental value, or even the personal use and enjoyment of the plaintiff's property." *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1213 (6th Cir. 1988) (citing cases). Likewise, pre-judgment interest on economic damages (*e.g.*, lost profits) is "calculated from some *specific* date or dates as found by the court that precede the date of the judgment, and is computed from that date or dates down to the date of the judgment at the prejudgment rate . . . ." *American Buildings Co. v. DBH Attachments, Inc.*, 676 S.W.2d 558, 566 (Tenn. App. 1984) (emphasis added). In the instant case, the jury awarded pre-judgment interest on the Saylors' total compensatory damage award of $875,000.00 from the time that they leased the Harvestore equipment in July 1980, to the date of the jury verdict in June 1987. This award constitutes a "manifest and palpable abuse of discretion" since it is clear from the record that the Saylors did not incur all of their damages in 1980, but instead suffered gradual losses from 1980 until 1985. Therefore, the jury clearly erred in its calculation of prejudgment interest.

The defendants argue that the jury's error requires a new trial because, as they assert, there is no principled

manner in which to calculate a remittitur on the present state of the record. We disagree. Although the general verdict in this case does not allow for a precise calculation on our part of the proper amount of pre-judgment interest, the record permits us to fashion a minimum award. Since it is clear from the record that the Saylors incurred *all* of their damages (both property losses and economic losses) by July 1985, we believe that the Saylors are entitled to at least two of the seven years of pre-judgment interest which the jury awarded. Therefore, applying the jury's chosen interest rate of eight percent per year to the compensatory damage award of $875,000.00, we conclude that a pre-judgment interest award of $140,000.00 is permissible on the record presented. Accordingly, we believe that a remittitur of $350,000.00 of the jury's pre-judgment interest award is required.

V.

For the reasons set forth above, the order of the district court denying the defendants' motion for a new trial is REVERSED to the extent that it failed to direct a remittitur of a portion of the pre-judgment interest award. Accordingly, we REMAND this case to the district court with instructions to grant a new trial *limited to the damages issue*, unless the plaintiffs file in the district court, within thirty days of the filing of this opinion, a motion requesting a remittitur of $350,000.00 of the pre-judgment interest award.

[Filed July 10, 1989]

No. 87-5990/6002
88-5279/5314

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AGRISTOR LEASING, A WISCONSIN PARTNERSHIP,

Plaintiff,

JAMES SAYLOR AND KAAREN SAYLOR d/b/a UDDER NONSENSE DAIRY,

Defendants, Counter Plaintiffs, Third Party Plaintiffs-Appellees,

v.

A.O. SMITH HARVESTORE PRODUCTS,

Third Party Defendants-Appellants.

ORDER

BEFORE: KEITH, JONES and GUY, Circuit Judges.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
Leonard Green, Clerk

[Filed February 8, 1988]

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
WINCHESTER DIVISION

No. CIV-4-83-94

JAMES SAYLOR and wife, KAAREN SAYLOR, individually and d/b/a "UDDER NONSENSE DAIRY"

v.

A. O. SMITH HARVESTORE PRODUCTS, INC., HERMITAGE HARVESTORE SYSTEMS, INC., and CHUCK DOWDY

ORDER

The defendants in this case contended that an outside communication was made to a juror and that a juror was previously acquainted with a witness in this case. In order to investigate these allegations, this Court held a full judiciary inquiry on January 21, 1988. After conducting the inquiry, this Court finds that there was absolutely no juror misconduct, that any contact which occurred was harmless, and that all jurors exhibited exemplary behavior at all times. Accordingly, the defendant's motion for a new trial is hereby DENIED.

ENTER:

/s/ THOMAS G. HULL
Thomas G. Hull
United States District Court

Summary Chart Of Judicial Inquiry Testimony

Juror	Knowledge of Contact During Trial	Substance of Communication	Other Jurors Told	Contact Reported[1]	Knowledge of Contact After Trial
Bell[2]	Yes (JA 519)	First Trial (JA 520)	No (JA 522)	To Marshal (JA 519, 521)	–
Lawwell	Yes (JA 512)	Mr. Saylor (JA 514)	Yes (JA 512)	–	–
Posey	Yes (JA 525)	Cannot Recall (JA 527)	Yes (JA 527)	Not Certain (JA 525)	–
Davidson	No (JA 531-32)	–	–	–	Yes, Mrs. Bell told all jurors on day of judicial inquiry (JA 534)
Bradford	No (JA 535)	–	–	–	No (JA 535)
Scarbrough	No (JA 536-37)	–	–	–	No (JA 537)
Decker	Yes (JA 538)	Cannot Recall (JA 539)	Yes (JA 539)	To Clerk (JA 539)	–

[1] One of Respondents' counsel stated that his partner initially reported the incident to the court. (JA 507).

[2] Bell was the juror who had the extraneous communication with the interested spectator.